INTERIOR BOARD OF INDIAN APPEALS

Estate of Henry W. George

15 IBIA 49 (11/17/1986)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF HENRY W. GEORGE

IBIA 86-3, 86-27 Decided November 17, 1986

Appeal from an order after rehearing issued by Administrative Law Judge Robert C. Snashall in Indian Probate Nos. IP PO 232L 84-284, IP PO 145L 83-184.

Affirmed in part, reversed in part.

1. Indian Probate: Appeal: Generally

   The person challenging an Administrative Law Judge's decision in the Departmental probate of a deceased Indian's trust estate bears the burden of proving error.

2. Indian Probate: Children, Illegitimate: Generally

   Although preferable, documentary evidence of paternity is not a prerequisite to a finding of paternity in Departmental probate of Indian trust estates.

3. Evidence: Hearsay--Indian Probate: Evidence: Hearsay Evidence

   Hearsay evidence is admissible as an exception to the general rule in Departmental probate of Indian trust estates when it pertains to matters of family history, relationship, and pedigree.

APPEARANCES: Patrick Andreotti, Esq. , Yakima, Washington, for Ella Jim; William C. Murphy, Esq., Toppenish, Washington, for the George appellants.

OPINION BY ADMINISTRATIVE JUDGE LYNN

On October 17, 1985, the Board of Indian Appeals (Board) received a notice of appeal from Ella Jean Jim (Jim). This appeal was assigned Docket No. IBIA 86-3. A second notice of appeal was forwarded to the Board by Administrative Law Judge Robert C. Snashall on October 25, 1985. The second appeal was filed by Levi George, Randy George, Lewis C. George, Victor George, Michael George, Monica N. George, Evelyn George Hawk, Isabel George Colwash, Vivian George Smartlowit, and the estate of Mabel George Shike (George appellants) and was assigned Docket No. IBIA 86-27. Both appeals seek review of Judge Snashall's August 19, 1985, order after rehearing in the estate of

Henry W. George (decedent). These appeals are hereby consolidated for decision. For the reasons discussed below, the Board affirms the order in part, and reverses it in part.

Background

Decedent, Yakima No. 124-U4685, was born on April 23, 1911, and died on February 12, 1983, in Toppenish, Washington, of natural causes. A hearing to probate his Indian trust estate was held before Judge Snashall on September 14 and December 6 and 7, 1983. As the result of evidence and stipulations presented in the course of that hearing, Judge Snashall approved decedent's last will and testament, dated July 20, 1982, and found that Jim had not proven that decedent was her father. Accordingly, in an order dated May 25, 1984, the Judge ordered decedent's entire estate distributed to his brother, Jack George, in accordance with decedent's will.

Petitions for rehearing were timely filed by Jim and by Mabel George Shike, decedent's niece. 1/ Although there were technical problems with both petitions that would have justified denial of rehearing, Judge Snashall determined that the seriousness of the allegations raised warranted rehearing. Rehearing was held on May 7, 1985. At that hearing, Jim presented further evidence on her claim that decedent was her father and several of the present George appellants attacked decedent's competence to execute a will.

By order dated August 19, 1985, Judge Snashall affirmed his initial May 25, 1984, order. Both Jim and the George appellants filed appeals from this order, and submitted briefs on appeal.

Discussion and Conclusions

[1] The person challenging a Judge's decision in the probate of a deceased Indian's trust estate bears the burden of proving error. Estate of Charles James Roane, 14 IBIA 265 (1986), and cases cited therein. In this case, therefore, Jim and the George appellants must each show that the Judge's decision was not supported by substantial evidence.

The Board will first consider the question of decedent's testamentary capacity, raised by the George appellants. Initially the George appellants rely upon a statement made by Judge Snashall during the rehearing to argue that he upheld the will because its execution was proper, despite the fact that it did not set forth the testamentary scheme decedent intended. In context, Judge Snashall said:

> What I'm trying to point out to you is that if he, if he deliberately called people over who were not part of the family, had no connection with them, and asked them to draw a Will for him, they took his testimony, they talked to him and they drew the Will and he said, "this is what I want" and he signed it, is a different thing than what he may have tried to con somebody with

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1/ Mabel Shike died during the pendency of rehearing.

> or might have tried to explain to you or other members of the family, or something else; in other words, if he completed every thing that the law requires him to do for an executed proper Last Will and Testament, it's immaterial what his purpose or intent may have been. His intent is he intended to execute a valid Last Will and Testament, that controls irrespective of what he may have told somebody or indicated to somebody. Now here you've got a man who drew a series of Wills and each one, at the time he drew it apparently he, except for the last one, he was living with members of the family for whom he drew it.

(May 1, 1985, hearing transcript at 175; emphasis added to indicate portion of statement quoted by the George appellants.)

The George appellants argue the testimony of one of the will witnesses verifies that, although decedent knew he was executing a will, he did not understand or intend the testamentary disposition actually made. The witness testified she was surprised when decedent told the will scrivener he wanted his property to go to his brother because he told her he "had" wanted it to go to his nephew, the beneficiary under two prior wills (May 7, 1985, hearing transcript at 119-20).

When the Judge's comment is read in context, it is clear the "purpose or intent" to which he is referring is the purpose or intent or reason for making a particular testamentary disposition. The Board, therefore, rejects the argument that the comment refers to decedent's testamentary scheme per se.

Furthermore, the testimony of the will witness merely shows that at some time decedent intended to leave his property to his nephew. The witness assumed that was decedent's present intention.

The George appellants' remaining arguments merely dispute the weight to be given to the testimony of various witnesses. The Judge's decision acknowledges the conflicts in the testimony. He nevertheless concluded the evidence as a whole indicated decedent had testamentary capacity. This decision is supported by the record. See Estate of Woody Albert, 14 IBIA 223 (1986). Accordingly, the George appellants have not sustained their burden of proving the error in Judge Snashall's decision.

Appellant Jim argues the Judge improperly found that she had not proven decedent was her father.

The Judge stated at pages 2-3 of his August 19, 1985, order after rehearing:

> JIM has failed to present any material supportive evidence of her position she was the child of the decedent. The documents she filed ostensibly in support of her allegations are again [self-serving] documents as was the testimony of her various witnesses. There is not one scintilla of direct evidence of any memorialized actions of the decedent wherein he recognizes this individual as his child. That is to say, not one written document of

> acknowledgment. In the absence of such acknowledgment and in view of his clearly stated statement in his Last Will and Testament that he had no children, I would be remiss in holding the evidence produced by petitioner was sufficient to authorize a finding of her paternity. It should be noted the only independent evidence produced by petitioner of the alleged parentage was the hearsay testimony of a former employer of the decedent and given the general character of the decedent, little weight can be given to his statements to the witness.

The Judge noted he found only that Jim had not established that decedent was her father. Footnote 2 of his order states:

> The findings and conclusions made herein as to the paternal parentage of petitioner ELLA JEAN JIM are made solely within the required legal framework of the Indian trust probate forum. It may well be within and for tribal jurisdiction areas (e.g., enrollment, cultural heritage, etc.) petitioner's evidence is sufficient to establish the contended paternal relationship.

Judge Snashall thus based his decision on the lack of documentation by decedent recognizing Jim as a daughter and his belief that any oral statements made by decedent were not necessarily credible.

[2] The Board has previously discussed the evidence necessary to support a finding of paternity in the context of Departmental probate proceedings. The existence of documentary evidence, and especially of a written acknowledgment of paternity, makes a paternity determination much easier, but such evidence is not a prerequisite for a finding of paternity. See, e.g., Estate of Jason Crane, 12 IBIA 165 (1984); Ruff v. Portland Area Director, 11 IBIA 267 (1983), dismissed, Civil No. 83-1329 (D. Or. Mar. 16, 1984), aff'd, 770 F.2d 839 (9th Cir. 1985).

[3] In this case there is no probative documentary evidence concerning the identity of Jim's father. The record clearly establishes, however, that Jim's mother has consistently and publicly represented that decedent was her daughter's father. Other witnesses who professed knowledge of the identity of Jim's father consistently testified decedent was her father. No witness suggested any other person as being her father. At most, adverse witnesses testified they did not know who her father was and had never heard that decedent was her father. Although all this testimony was hearsay, hearsay testimony of family relationships is admissible in Departmental probate proceedings. Estate of San Pierre Kilkakhan (Sam E. Hill), 1 IBIA 299, 79 I.D. 583 (1972), after remand, 4 IBIA 93 (1975).

The Judge concluded that the testimony of disinterested witnesses, to the effect that decedent was Jim's father, could not be credited because he believed little weight could be given to decedent's statements because of decedent's general character. Although there was considerable testimony concerning whether decedent was sober or intoxicated when he acknowledged Jim as

his daughter, the record shows such statements were made at both times. The Board believes decedent made the same oral acknowledgment of paternity to too many people on too many occasions when there was no apparent motive for him to misrepresent the facts for it to be dismissed because of the stated reasons.

Accordingly, although the evidence is not overwhelming and with full knowledge of decedent's statement in his will that he had no children, the Board believes the preponderance of the evidence is that decedent was Jim's father.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Judge's August 19, 1985, order is affirmed in part and reversed in part.

//original signed
Kathryn A. Lynn
Administrative Judge

I concur:

//original signed
Anita Vogt
Acting Chief Administrative Judge